

VERMONT ENVIRONMENTAL BOARD
10 V.S.A. §§ 6001-6092

Re: Agency of Transportation
Application #4C 1 **01** 0-EB (Interlocutory)

MEMORANDUM OF DECISION

This Memorandum of Decision pertains to a motion for interlocutory appeal filed by Wayne M. Senville. Mr. Senville asks the Board to conclude that a Notice of Hearing issued by the District #4 Environmental Commission ("District Commission") in the above-referenced matter violated the Vermont Public Meetings Law and 10 V.S.A. § 6001-6092 ("Act 250"). He requests the Board appoint a new panel to re-hear evidence concerning 10 V.S.A. § 6086(a)(9)(A) ("Criterion 9(A)") or to re-hear the evidence itself. As explained more fully below, the Vermont Environmental Board ("Board") denies the motion.

I. BACKGROUND

On March 24, 1997, the Vermont Agency of Transportation ("AOT") filed an application for a land use permit ("Application") to reconstruct an approximately three-mile portion of Shelburne Road (U.S. Route 7) in the Town of Shelburne and the City of South Burlington, Vermont.

By letter dated April 28, 1997 and mailed to the members and the coordinator ("Coordinator") of the District Commission, Mr. Senville expressed concerns regarding Criterion 9(A). Mr. Senville did not request party status in the letter. Mr. Senville did not forward a copy of the letter to AOT.

The District Commission convened hearings on the Application on May 1, 8, and 23, 1997 and August 5, 1997. At the May 23, 1997 hearing, Mr. Senville submitted a request for party status as to Criterion 9(A). The District Commission orally denied his request.

On September 25, 1997, Mr. Senville filed a letter with the District Commission requesting (i) that the August 5, 1997 hearing be re-warned and re-opened due to the Commission's alleged violation of its own Notice of Hearing; (ii) that the District Commission refrain from deliberating on the Application until it re-hears Criterion 9(A); and (iii) that a written ruling be provided regarding the denial of party status.

On September 30, 1997, the District Commission issued an order memorializing its prior oral ruling as to party status and finding that the Notice of Hearing was "in order."

On October 9, 1997, the Coordinator issued a notice designating Mr. Senville as

District Commission witness, instructing Mr. Senville to submit prefiled testimony on or before October 17, 1997, and scheduling a re-convened hearing on the Application for October 31, 1997.

On October 10, 1997, Mr. Senville filed a document entitled Interlocutory Appeal' ("Motion") together with a supporting memorandum.

On October 17, 1997, AOT filed Applicant's Response to Wayne M. Senville's Interlocutory Appeal.

On October 20, 1997, Mr. Senvilie filed a letter with the Board indicating that, because he had been designated a Commission witness, he anticipated that he would withdraw his appeal at some point in the future.

On October 22, 1997, the Board deliberated concerning the Motion,

II. DECISION

An interlocutory appeal which does not pertain to party status may be initiated as follows:

Motion for interlocutory appeal regarding all orders or rulings except those concerning party status[.] Upon motion of any party, the [B]oard may permit any appeal to be taken from any interlocutory (preliminary) order or ruling of a district commission if the order or ruling involves a controlling question of law as to which there is substantial difference of opinion and an immediate appeal may materially advance the application process. The appeal shall be limited to questions of law.

EBR 43(A). Parties and persons denied party status may file a motion to initiate an interlocutory appeal regarding party status. EBR 43(B).

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Interlocutory Appeals are initiated by a timely motion filed with the Board pursuant to Environmental Board Rule ("EBR") 43. It is within the Board's discretion to grant the motion (allowing the appeal to proceed) or to deny the motion. Id. Although Mr. Senville's Interlocutory Appeal is not framed as a motion, it was timely filed and the Board will regard it as a motion for purposes of this Memorandum of Decision.

In the instant proceeding, the Board denies Mr. Senville's Motion on two independent grounds. First, the Board concludes that Mr. Senville lacks standing to pursue an interlocutory appeal. In his Motion and supporting memorandum, Mr. Senville states that he is attempting to appeal "only from the District Commission's Sept. 30, 1997 ruling (on page 3) regarding the sufficiency of the August 5, 1997 hearing notice, and not from the District Commission's party status ruling." Memorandum in Support of Interlocutory Appeal at 1. A motion to appeal any ruling other than one concerning party status may be filed by "any *party*." EBR 43(A)(emphasis supplied). Mr. Senville was denied party status in the proceeding before the District Commission. Therefore, Mr. Senville lacks standing to file the Motion.

Second, even if the Board were able to conclude that Mr. Senville has standing to pursue an interlocutory appeal, the Board must deny the Motion. Assuming for the purposes of this analysis that the issue raised in the Motion is a "controlling question of law," the Board cannot conclude that it is one "as to which there is substantial difference of opinion." EBR 43(A). Mr. Senville contends that an alleged deficiency in the August 5, 1997 hearing notice denied him the opportunity to express his opinions concerning Criterion 9(A) pursuant to 1 V.S.A. § 3 12 ("Public Meeting Law"). The Public Meeting Law specifically provides that members of the public may not participate in quasi-judicial proceedings in the same manner as permitted in other public meetings. Id. § 3 12(h). A hearing before a district commission is a quasi-judicial proceeding governed by the Administrative Procedures Act, 3 V.S.A. ch. 25. Only parties may participate in Act 250 proceedings. 3 V.S.A. § 809; 10 V.S.A. § 6085. Because Mr. Senville did not have party status in the District Commission proceeding, he had no right to provide testimony or make other public statements to the District Commission. He had, at most, the right to be present at the August 5, 1997 hearing in order to listen to the testimony of the parties. If Mr. Senville would like to hear this testimony, he may review the audio tapes made of the proceeding. Therefore, the Board concludes that if the Motion involves a controlling question of law, it is not one as to which there can be a substantial difference of opinion. Accordingly, for this second, independent reason, the Board denies Mr. Senville's motion for interlocutory appeal.

III. ORDER

1. The Board denies Mr. Senville's motion for interlocutory appeal regarding that portion of the District Commission's Order of September 30, 1997 relating to the Commission's Notice of Hearing.

2. The Board denies Mr. Senville's request for a stay of the proceeding below and returns jurisdiction to the District #4 Environmental Commission.

Agency of Transportation (Shelburne Road Reconstruction)

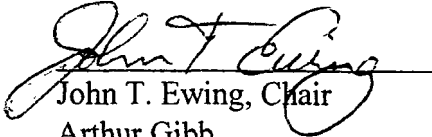
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Dated at Montpelier, Vermont, this 22nd day of October, 1997.

ENVIRONMENTAL BOARD



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